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IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. THE FERC'S PUBLIC CONFERENCE IS NO BARRIER TO REVIEW.

FERC's Public Conference in *Application of the Primary Function Test for Gathering on the Outer Continental Shelf*, Docket No. AD03-13-000 should not affect the Court's consideration of this petition.

Over a year ago, on October 25, 2002, FERC convened a public conference on natural gas markets in Docket No. PL02-9, which included a review of FERC's "offshore gathering policy." FERC received statements of position from all sectors of the industry, heard presentations by a panel of six witnesses (representing most of the parties to this case), and then received post-conference written comments in

which no participant supported the FERC's central point of aggregation test. Yet the FERC took no action to alter that test.

There is no reason to anticipate a different result from the current conference, which was held on September 23, 2003, yet has produced no word from the Commission. Moreover, an agency should not be able to evade this Court's review simply by announcing, while a petition is pending, an intent possibly to rethink the decision for which review is sought.

The crux of this case is that the FERC's central point of aggregation test and the court of appeals' approval of that test contravene this Court's ruling in *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84. 90 (1963), that "gathering" under § 1(b) of the Natural Gas Act ("NGA") is "narrowly confined to the physical acts of * * * preparing the gas for the first stages of distribution." The Commission's post-petition decision to "explore" that very issue is no reason to deny review.

Respondents opposed review of the FERC's earlier orders in *Sea Robin*[1] on grounds of asserted "prematurity" since the newly classified gathering lines in that case continued to be subject to the Commission's "in connection with" rate jurisdiction. Here, however, the subject Transco facilities have been transferred to a non-jurisdictional affiliate and are thus beyond the FERC's jurisdiction. Accordingly, neither the Commission's public conference nor prematurity concerns bar review of the decision below.

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[1] *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384 (1999), *order denying reh'g*, 92 FERC ¶ 61,072 (2000), *aff'd sub nom ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002), *cert. denied*, 124 S. Ct. 48 (2003).

II. THE FERC'S ORDERS CONFLICT WITH THIS COURT'S INTERPRETATION OF § 1(b) OF THE NGA IN *NORTHERN NATURAL*.

The FERC does not really contest our point that its chosen dividing line between gathering and transportation on Transco's offshore systems has nothing to do with where gas on these pipelines is physically prepared for the first stages of distribution. Instead, as if verbiage were virtue, FERC argues (Opp. at 13) that its "orders exhaustively reviewed the relevant physical factors and specifically found that some (but not all) of Transco's systems were engaged in gathering." But the number of factors considered or the pages devoted to analysis are irrelevant if the result does not define the end point of gathering in reasonable proximity to the point where the gas is prepared for the first stages of distribution.

Moreover, FERC *did not* examine all of the relevant factors, because it gave no consideration to where the gas on Transco's offshore facilities is prepared for the first stages of distribution, as directed by *Northern Natural*. As we point out below, that point is located at or near the production platforms just upstream of Transco's former facilities where the gas is separated to remove free water and (if necessary) dehydrated to remove excess water vapor so that it will be acceptable for carriage on Transco's pipelines.

The NGA exempts only gathering lines, and we know from *Northern Natural* both that the exemption must be narrowly confined and that gathering has to do with physical acts of preparing the gas for the first stages of distribution. Because no physical preparation of the gas occurs at or near any of FERC's selected demarcation points on Transco's facilities, the FERC's orders below are contrary to the statute.

Respondents suggest (FERC Opp. at 12; Williams Opp. at 6-7) that this Court's interpretation of § 1(b) no longer holds because the "unbundling" of gas services in the interstate

market requires deference to the FERC's contrary interpretation. But only this Court can declare *Northern Natural* obsolete. *Chevron*[2] deference does not license the FERC to interpret the statute differently from settled law, no matter how many factors the FERC offers in support of its view. *See Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.").[3]

III. THE LIMITED REGULATION OF PIPELINES UNDER § 5(f) OF THE OCSLA IS IRRELEVANT TO THE NEED FOR REVIEW OF THE FERC'S JURISDICTIONAL TEST UNDER THE NGA.

Respondent Williams asserts (Opp. at 9-11) that shippers on OCS pipelines are compensated for the loss of rate protection under the NGA by the enactment in 1978 of § 5(f) of the Outer Continental Shelf Lands Act ("OCSLA"). As the FERC has recognized many times, however, § 5(f) does not fix rates but only requires open and nondiscriminatory access to OCS pipelines.[4] The OCSLA contains no provision

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[2] *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).

[3] *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (the Court's settled interpretation of a statute trumps *Chevron* deference to an agency's interpretation); *Maislin Ind., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

[4] *See, e.g., Transcontinental Gas Pipe Line Corp.*, ("*Transco*") 97 FERC ¶ 61,300 at 62,409 (Pet. App. 98a); *Transco*, 97 FERC ¶ 61,298 at 62,396 (Pet. App. 235a); *Transco*, 97 FERC ¶ 61,296 at 62,382 (Pet. App. 168a); *Trunkline Gas Co.*, 97 FERC ¶ 61,169 at 61,799; *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas or Facilities on the Outer Continental Shelf*, Order No. 639-A, III FERC Stats. & Regs. ¶ 31,103 at 31,686 (2000), *vacated, Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *aff'd, Williams Cos. v. FERC*, 345 F. 3d 910 (D.C. Cir. 2003) (recognizing that the OSCLA does not provide for rate regulation equivalent to that of the

analogous to §§ 4 and 5 of the NGA, requiring OCS pipelines to charge only "just and reasonable" rates on file with and approved by the Commission.

Indeed, Congress included a savings clause in § 5(f)(4) of the 1978 OCSLA Amendments to make clear that the addition of § 5(f) would not "limit, abridge, or modify * * * any other provision of law with respect to pipelines on or across the outer Continental Shelf." 43 U.S.C. § 1334(f)(4). That clause by itself demonstrates that Congress never intended that OCSLA § 5(f) could be viewed as a substitute for NGA §§ 4 and 5.

IV. RESPONDENTS MISCHARACTERIZE OUR POSITION.

Respondents criticize what they claim is our "novel view that any movement of gas in a pipeline operating in the OCS beyond the platform constitutes transportation." (FERC Opp. at 13; *see also* Williams Opp. at 15.) But that misstates our position, which is that transportation starts once the gas is delivered to a pipeline downstream of where the gas is treated on a platform to make it acceptable for transport to shore. That pipeline interconnection might be at the production or service platform itself or at a subsea tap downstream of the platform. Our view that gathering ceases at the pipeline interconnections located at or just downstream of such production or service platforms was precisely the FERC's view, for over three decades, in its exercise of jurisdiction over Transco's OCS pipelines.[5]

NGA). "Pet App." references are to the appendix in the companion case, *Shell Offshore Inc.* v. *FERC*, No. 03-431.

[5] Contrary to Respondents' contention (FERC Opp. at 13; Williams Opp. at 15), the result we seek is supported by, not in conflict with, *EP Operating v. FERC*, 876 F.2d 46 (5th Cir. 1989). That case held that gathering ended at the offshore platform where free water was removed and the gas was dehydrated, even though the platform was 51 miles from

In sum, the decision below is wrong; there are no impediments to its review; and the question presented is of paramount importance to the orderly and successful development of natural gas resources on the Outer Continental Shelf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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the production platform. 876 F.2d at 49. Thus the decision supports our view that lines that carry gas and free water are gathering lines, while lines that carry gas to shore after full separation of free water are transportation facilities.